In the United States Court of Appeals for the Ninth Circuit

Civil Case No. 15951

In the Matter of a Petition of

ROBERT ALLEN PRITCHARD for a Writ of Habeas Corpus,

ROBERT ALLEN PRITCHARD,

Petitioner-Appellant,

v.

CLARENCE T. GLADDEN, Warden of the Oregon State Penitentiary,

Respondent-Appellee.

Appeal From an Order Denying a Petition For a Writ of Habeas Corpus

Honorable WILLIAM G. EAST, Judge

ROBERT Y. THORNTON
Attorney General of Oregon

PETER S. HERMAN
Assistant Attorney General
Salem, Oregon
Attorneys for Appellee

ROBERT ALLEN PRITCHARD
On his own behalf

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JURISDICTION OF UNITED STATES COURT OF APPEALS

This case is an appeal from an order of the United States District Court for the District of Oregon denying appellant's petition for a writ of habeas corpus. The Honorable William G. East granted a certificate of probable cause to permit an appeal from the order of denial. Title 28 U.S.C., § 2253, confers jurisdiction upon this court to review the order of denial.

JURISDICTION OF THE UNITED STATES DISTRICT COURT

The appellee challenges the jurisdiction of the United States District Court to entertain appellant's petition on the ground of appellant's failure to exhaust state remedies.

The following facts are pertinent to the question of the exhaustion of state remedies [see paragraphs IX and X of appellant's petition and exhibits annexed to petition, Tr. 1]:

1. May 7, 1952, appellant convicted under section 23-1034, O.C.L.A. (infra, p. 10) in the Circuit Court of the State of Oregon for Klamath County of the crimes of contributing to the delinquency of three minor children.

2. May 22, 1957, appellant's habeas corpus proceeding in the Marion County Circuit Court challenging aforesaid convictions dismissed.

3. *No appeal taken from this order of dismissal.*

4. Petition for writ of habeas corpus filed in Oregon Supreme Court.

5. June 5, 1957, Oregon Supreme Court denied this petition without opinion.

STATEMENT OF THE CASE

In this appeal from a denial of a petition for a writ of habeas corpus the following federal* questions are raised:

1. Did appellant exhaust his state remedies?

2. Does section 23-1034, O.C.L.A., violate the equal protection clause of the Fourteenth Amendment to the United States Constitution by delegating to the district attorney or grand jury the power to decide whether a case should be prosecuted as for a felony or as for a misdemeanor?

3. Is section 23-1034, O.C.L.A., sufficiently definite to satisfy the due process clause of the Fourteenth Amendment to the United States Constitution?

4. Does section 23-1034, O.C.L.A., violate the equal protection clause of the Fourteenth Amendment to the United States Constitution by reason of the fact that the court has the discretion after conviction to (a) fine or (b) imprison in the county jail or (c) impose both such fine and imprisonment or (d) punish by imprisonment in the Oregon State Penitentiary?

SUMMARY OF ARGUMENT

I

Appellant failed to exhaust his available state remedies and therefore United States District Court did not

have jurisdiction of appellant's petition for a writ of habeas corpus.

Point and Authorities 1

A federal court may not grant a writ of habeas corpus to a state prisoner unless the prisoner has availed himself of one of the corrective processes available in the courts of the state.

United States v. Fay, 248 F. (2d) 520 (2nd Cir., 1957)

Point and Authorities 2

After the dismissal of a writ of habeas corpus by the Marion County Circuit Court, the only corrective process available in Oregon is an appeal from the order dismissing the habeas corpus proceedings.

ORS 34.710
Wix v. Gladden, 204 Or. 597, 284 P. (2d) 356 (1955)

Point and Authorities 3

Since the appellant failed to appeal to the Oregon Supreme Court from the dismissal by the Oregon Circuit Court of appellant's writ of habeas corpus, appellant is precluded from prosecuting habeas corpus in the federal courts.

Daniels (Brown) v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953)

II

Section 23-1034, O.C.L.A., does not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution by granting discretion to the grand jury or district attorney to prosecute as for a felony or a misdemeanor.

Point and Authorities 1

Under Oregon law whether a crime is a felony or a misdemeanor is determined by the punishment authorized to be imposed.

United States Constitution, Fourteenth Amendment
Title 28, U.S.C., § 2241
Oregon Constitution, Article III, section 1
§ 23-101, O.C.L.A.
§ 23-102, O.C.L.A.
§ 23-103, O.C.L.A.
§ 23-1034, O.C.L.A.
Andrews v. Swartz, 156 U.S. 272, 15 S.Ct. 389, 39 L.Ed. 422
State v. Pirkey, 203 Or. 697, 281 P. (2d) 698 (1955)

Point and Authorities 2

Where the punishment authorized may be imprisonment in the penitentiary or jail, or imposition of a fine, the crime is a misdemeanor only if the court, after conviction, imposes a sentence other than incarceration in the penitentiary.

Point and Authorities 3

The only discretion conferred by section 23-1034, O.C.L.A., resides in the court which after conviction may punish as for a misdemeanor or as for a felony.

Oregon Laws 1949, Chapter 129, section 1
§ 23-1034, O.C.L.A.
State v. Pirkey, 203 Or. 697, 281 P. (2d) 698 (1955)

III

Section 23-1034, O.C.L.A., under which appellant was convicted is sufficiently definite to satisfy the due process clause of the Fourteenth Amendment to the United States Constitution.

Point and Authorities

The terms of section 23-1034, O.C.L.A., are sufficiently explicit to have informed the appellant that the conduct which he engaged in was prohibited and subject to penalty.

United States Constitution, Fourteenth Amendment
§ 23-101, O.C.L.A.
§ 23-102, O.C.L.A.
§ 23-103, O.C.L.A.
§ 23-910, O.C.L.A.
§ 23-1034, O.C.L.A.
§ 93-603, O.C.L.A.
Connally v. General Construction Co., 269 U.S. 383, 46 S.Ct. 126, 70 L.Ed. 332
State v. Anthony, 179 Or. 282, 169 P. (2d) 587, cert. den. 330 U.S. 826, 67 S.Ct. 865, 91 L.Ed. 1276
State v. Friedlander, 141 Wn. 1, 250 P. 453 (1927) writ of error dismissed, 275 U.S. 573, 48 S.Ct. 17, 72 L.Ed. 433

IV

Section 23-1034, O.C.L.A., does not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution although the punishment thereunder may be as for a felony or as for a misdemeanor.

Point and Authorities

A statute does not violate the equal protection clause of the Fourteenth Amendment to the United States Constitution simply because the court has the discretion after conviction to punish as for a felony or as for a misdemeanor.

United States Constitution, Fourteenth Amendment

§ 23-103, O.C.L.A.

§ 23-1034, O.C.L.A.

Ex Parte Rosencrantz, 211 Cal. 729, 297 P. 15 (1931)

People v. Queen, 326 Ill. 492, 158 N.E. 148 (1927)

United States v. Meyers, 143 F. Supp. 1 (D. Alaska, 1956)

Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337

ARGUMENT

I

(Point 1)

It is well a settled principle of law that a federal court may not grant a writ of habeas corpus to a state prisoner unless the prisoner has first availed himself of *one* of the corrective processes available in the courts of the state: *United States v. Fay*, 248 F. (2d) 520 (2nd Cir., 1957).

(Point 2)

Under Oregon law where a writ of habeas corpus is dismissed by the circuit court, the proper procedure is to appeal from the order of dismissal: ORS 34.710 (appendix p. 22). In this case appellant did not appeal from the order of the Oregon Circuit Court dismissing his writ of habeas corpus. Instead, appellant chose to file a petition for a writ of habeas corpus in the Oregon Supreme Court, presumably raising the same grounds as raised in the Oregon Circuit Court (subparagraph 2 of paragraph IX, appellant's petition, Tr. 1). Such a procedure is not available under Oregon law: *Wix v. Gladden*, 204 Or. 597, 284 P. (2d) 356 (1955) [Appendix, p. 23].

(Point 3)

By failing to exhaust available state corrective procedures appellant has now lost the right to challenge

his conviction in a federal court: *Daniels (Brown) v. Allen*, 344 U.S. 443, 482, 485-587, 73 S.Ct. 397, 97 L.Ed. 469 (1953), [Appendix, p. 22].

II

(Point 1)

Appellant argues (App. Br. p. 3) that section 23-1034, O.C.L.A., violates Article III, section 1, Oregon Constitution because that statute unlawfully gives a district attorney or grand jury the legislative function of determining whether the crime to be prosecuted is a felony or a misdemeanor. In *form*, perhaps, this contention does not present the federal question of whether appellant is in custody "in violation of the Constitution of the United States": Title 28 U.S.C. § 2241; *Andrews v. Swartz*, 156 U.S. 272, 15 S.Ct. 389, 39 L.Ed. 422.

In *substance*, however, the contention, if correct, raises the question of a denial of equal protection of the laws under the Fourteenth Amendment to the United States Constitution: *State v. Pirkey*, 203 Or. 697, 708, 281 P. (2d) 698 (1955) [Appendix p. 23]. Appellee submits, however, that as applied to section 23-1034, O.C.L.A., the contention is without merit.

In the first place, whether a crime is a felony or misdemeanor is determined, under Oregon law, in general, by the punishment authorized to be imposed: sec-

tions 23-101, 23-102, 23-103, O.C.L.A., (Appendix p. 21, 22). If the punishment authorized to be imposed is death or imprisonment in the penitentiary, the crime is a felony: section 23-101, O.C.L.A., supra. If the crime is punished by fine or imprisonment in the county jail, the crime is a misdemeanor: id.

(Point 2)

Secondly, where the court is authorized to impose either a penitentiary or jail sentence, fine or both jail and fine, it is the *punishment imposed by the court after conviction* that classifies the crime as either a misdemeanor or a felony: id.

(Point 3)

Thirdly, an examination of section 23-1034, O.C.L.A., supra, discloses that the only discretion conferred by the legislature in that statute resides in the court.

By way of contrast the legislature did expressly confer upon the magistrate or grand jury in section 1, chapter 129, Oregon Laws 1949 (Appendix p. 20) the discretion to determine whether the defendant should be proceeded against as for a felony or as for a misdemeanor. This statute was held unconstitutional in *State v. Pirkey*, supra.

III

Appellant next argues (App. Br. 4) that section 23-1034, O.C.L.A., under which appellant was convicted, is unconstitutional and void under the due process clause of the Fourteenth Amendment because it is too broad and too sweeping.

Section 23-1034, O.C.L.A., provided as follows:

> "In all cases where a child shall be a *delinquent child as defined by any statute of this state*, any person responsible for, or by any act encouraging, causing or contributing to the delinquency of such child, or any person who shall by threats, command or persuasion, endeavor to induce any child to do or perform any act or follow any course of conduct which *would cause such child to become a delinquent child*, or any person who shall do any act which *manifestly tends to cause any child to become a delinquent child, shall be guilty of a crime* and, upon trial and conviction thereof, shall be punished by a fine of not more than $1,000, or by imprisonment in the county jail for a period not exceeding one year, or by both such fine and imprisonment, or by imprisonment in the state penitentiary for a period not exceeding five years." (Emphasis supplied)

It is to be noted that the above statute punishes persons who (1) are responsible for the delinquency of a child or (2) contribute to the delinquency of a child or (3) who induce any child to do an act or follow a course of conduct which would cause such child to become a delinquent child or (4) do any act which manifestly tends to cause the child to become a delinquent child.

The key phrases in the above statute are "delinquent child" and "delinquency of such child." By reference the statute incorporates the defintion of those terms as found in other statutes of Oregon. At the time of appellant's conviction child delinquency was defined by section 93-603, O.C.L.A., as follows:

> " 'Child delinquency' within the meaning of this act shall be defined as follows: Persons of either sex under the age of eighteen years *who violate any law of the state*, or any city or village ordinance, or persistently refuse to obey family discipline; or are persistently truant from school; or associate with criminals or reputed criminals; or are growing up in idleness and crime; or are found in any disorderly house, bawdy house, or house of ill fame; *or are guilty of immoral conduct*; or visit, patronize, or are found in any gaming house or in any place where any gaming device is or shall be operated, *are hereby classed as delinquent children* and shall be subject to the legal relations and provisions of the juvenile court law and other laws for the care and control of delinquents * * *." (Emphasis supplied)

Delinquent children are defined by the above statute to include persons "who violate any law of the state."

The informations (Appendix p. 18–20) against appellant charge him with soliciting three minor children to engage in "unnatural sexual relations" with him. If the children had in fact engaged in such relations they would have been guilty of sodomy: section 23-910, O.C.L.A., (Appendix p. 22); *State v. Anthony*, 179 Or. 282, 307,

169 P. (2d) 587 (1946) *cert. den.* 330 U.S. 826, 67 S.C. 865, 91 L.Ed. 1276.

It is submitted that the definition of "delinquent child" incorporated into section 23-1034, O.C.L.A., supra, was sufficiently explicit to have informed the appellant that the conduct which he engaged in was prohibited and subject to penalty: *Connally v. General Construction Co.*, 269 U.S. 383, 46 S.Ct. 126, 70 L.Ed. 332; *State v. Friedlander*, 141 Wn. 1, 250 P. 453 (1927), *writ of error dismissed* 275 U.S. 573, 48 S.Ct. 17, 72 L.Ed. 433.

Although appellant argues (App. Br. p. 4) that section 23-1034, O.C.L.A., is vague because it uses the phrase "shall be guilty of a crime," it is submitted that this argument is without merit in view of the explicit definitions of "crime" under Oregon law: sections 23-101, 23-102, 23-103, O.C.L.A. (Appendix p. 21, 22).

IV

Under section 23-1034, O.C.L.A., supra, the sentencing court after conviction has the discretion to (1) fine up to $1000 or (2) punish by imprisonment in the county jail for a period not exceeding one year or (3) both such fine and imprisonment or (4) punish by imprisonment in the State penitentiary for a period not exceeding five years. As to any punishment not resulting in a penitentiary sentence, the crime under section 23-1034, O.C.L.A., supra, is only a misdemeanor: section 23-103,

O.C.L.A., supra, (Appendix p. 22). A penitentiary sentence, of course, means the conviction constituted a felony: id.

Appellant argues (App. Br. p. 5) that the discretion in the sentencing court to classify the conviction as a felony or misdemeanor by the punishment imposed violates the equal protection provision of the Fourteenth Amendment to the United States Constitution.

The Supreme Court of the United States has pointed out, however, that

> "* * * The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. * * *" *Williams v. New York*, 337 U.S. 241, 247, 69 S.Ct. 1079, 93 L.Ed. 1337.

Although that case involved the question whether the due process clause of the Fourteenth Amendment to the United States Constitution was violated by a New York statute giving the trial judge the right to use extrajudicial information in passing sentence, the case clearly recognizes the propriety of a court's having discretion within the limits fixed by the legislature to determine the extent and kind of punishment to be imposed. The case is all the more striking because the New York Statute (set forth in footnote 2 at page 242 of 337 U.S. Reports) *gave the court the discretion to sentence to death even though the jury had recommended life.*

More directly in point are the cases of *People v. Queen*, 326 Ill. 492, 158 N.E. 148 (1927) and *Ex parte Rosencrantz*, 211 Cal. 729, 297 P. 15 (1931).

In the Queen case, supra, the court was confronted with the contention that an Illinois statute violated the equal protection clause of the Fourteenth Amendment to the United States Constitution because under that statute the court had the discreion to sentence male offenders between the ages of 16 to 26 to the penitentiary or reformatory. With reference to this contention the Illinois Supreme Court had this to say:

> "A sentence to the penitentiary renders the convict infamous while a sentence to the reformatory carries with it no such result. It is therefore a severer grade or degree of punishment than a sentence to the reformatory, and involves consequences to the convict of a much more serious character, as was held in People v. Mallary, 195 Ill. 582, 63 N.E. 508, 88 Am. St. Rep. 212. The statute, however, confers jurisdiction on the court to render the judgment of imprisonment in the penitentiary, and it is not a denial of the equal protection of the laws that the court imposed the higher degree of punishment. The power to impose a less severe penalty would not render the imposition of a severer penalty an arbitrary act. Many, if not most, of the sections of the Criminal Code declaring the punishment to be inflicted for violation of their provisions do not impose arbitrary punishments which are of a fixed and unchangeable character, but permit a discretion, which the court may exercise with reference to the circumstances attending the crime and the criminal. This practice has prevailed in this state from the beginning

of its existence and is in accordance with the practice which prevailed in England, where, it is said in Blackstone's Commentaries, the statute law has not often ascertained the quantity of fines nor the common law ever, it directing such an offense to be punished by fine in general without specifying the certain sum. The general nature of the punishment, whether by fine or imprisonment, was in these cases fixed, though the duration and quantity of each must frequently vary, from the aggravations, or otherwise, of the offense, the quality and condition of the parties, and from innumerable other circumstances. 4 Blackstone's Com. 378."

Ex parte Rosencrantz, supra, was a similar case. The contention there made and the holding of the court thereon is fully contained in the following:

"The contention is made that section 476a of the penal Code is unconstitutional, in that by reason of the discretion which it gives to the trial judge to sentence the convicted offender either to the state prison or the county jail, it is discriminatory in operation, and constitutes a denial of equal protection of the laws. The legislative practice of vesting in trial courts or juries discretion in fixing punishments, within certain limits, is quite general and not new. Since every person charged with the offense has the same chance for leniency as well as the same possibility of receiving the maximum sentence, there is nothing discriminatory in the statute."

See also the case of *United States v. Meyers,* 143 F. Supp. 1 (D. Alaska, 1956), where the court upheld an Alaskan criminal statute similar to the statute here in question and which gave the court broad discretion as to punishment.

In conclusion on this point it will suffice to note that it is far more humane for courts to have sufficient discretion in the imposition of punishment so that the punishment imposed—be it probation, fine, jail or penitentiary imprisonment—may fit the offender. Of course, that discretion must be delineated, but it is submitted that § 23-1034, O.C.L.A., fulfills that requirement.

CONCLUSION

For the reasons advanced the appellee submits that the judgment of the court below should be affirmed.

Respectfully submitted,

ROBERT Y. THORNTON
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PETER S. HERMAN
Assistant Attorney General
Attorneys for Appellee

APPENDIX

*

Appellant also argues (App. Br. p. 6) that his imprisonment is "without authority of law and in violation of due process of law" on the ground that "there was a single continuing act inspired by the same intent, and that he could be guilty of but one offense." The question here presented is simply whether under section 23-1034, O.C.L.A., contributing to the delinquency of three children (see informations, Appendix p. 18–20) is one or three crimes. It is submitted that this issue does not present a question of whether appellant is in custody "in violation of the Constitution of the United States": Title 28 U.S.C. § 2241; *Andrews v. Swartz*, 156 U.S. 272, 15 S.Ct. 389, 39 L.Ed. 422.

The argument ignores the fact that section 23-1034, O.C.L.A., proscribes conduct injuriously affecting *an individual child*: *United States v. Meyers*, 139 F. Supp. 724, 726 (D. Alaska, 1956). In that case the defendant was convicted by jury verdict upon nine counts charging contributing to the delinquency of a minor and was sentenced on each count. The first six counts charged the same offense of molesting a ten-year-old girl at various times and places. The last three counts charged the same offense at various times and places upon three other minor girls.

The defendant contended that the sentence under count 9 was void and illegal for the reason that the sentence under count 2 covered the same time, place and circumstances of the offense charged and hence constituted but one crime.

With reference to this contention the court said:

"In support of his first contention defendant relies upon the case of Bell v. United States, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905, holding that a conviction under two counts for violation of the Mann Act, 18

U.S.C.A. § 2421, each referring to a different woman transported on the same trip in the same vehicle, was not valid in the absence of specific provision by Congress making each act a separate offense, upon the principle that defendant committed only a single offense and could not be subjected to cumulative punishment under the two counts. To the same effect see Youst v. United States, 5 Cir., 151 F.2d 666, where the defendant was sentenced twice for the same conspiracy to violate such Act. These cases are clearly distinguishable from the crime of contributing to the delinquency of a child as defined by Sec. 65-9-11, A.C.L.A. 1949. The essence of the crime charged in the Bell case was transportation, and in the Youst case conspiracy, constituting one and the same act, *whereas the statute here involved contemplates the protection of the individual child.*

"Count 2 charged the commission of such offense upon one child and Count 9 upon another child, although at the same time and place. These counts charged separate and distinct offenses. It is fundamental that the court may impose separate and cumulative sentences under the same statute for distinct offenses. 15 Am. Jur., Criminal Law, Sec. 451; United States v. Peeke, 3 Cir., 153 F. 166, 12 L.R.A., N.S., 314; Ex parte Rudy, 7 Alaska 446. The true test is whether or not each offense requires proof of some fact which the others do not. United States v. Noveck, 273 U.S. 202, 206, 47 S.Ct. 341, 71 L.Ed. 610; Dimenza v. Johnston, 9 Cir., 130 F.2d 465. Such was true in this instance." (Emphasis supplied)

Information of District Attorney—2246-C (1)

(Annexed to Appellant's petition, Tr. 1)

"Robert Allen Pritchard having been accused and brought into Court and charged with the crime of Contributing To The Delinquency of A Minor and having

appeared before David R. Vandenburg, Judge of the above entitled Circuit Court, and waived Indictment therefore, the undersigned District Attorney of this District hereby files this Information against said Robert Allen Pritchard and charges him with the crime of Contributing To The Delinquency Of A Minor, committed as follows:

"The said Robert Allen Pritchard on the 26th day of April A. D. 1952, in the said County of Klamath and State of Oregon, then and there being, did then and there wilfully, unlawfully and feloniously encourage, solicit and endeavor to persuade Barbara Stinson, a female child of the age of 15 years, to do an act which would cause the said Barbara Stinson to become a delinquent child, to-wit: Did encourage, solicit and endeavor to persuade the Barbara Stinson to participate in unnatural sexual relationships with him, the said Robert Allen Pritchard, which said acts manifestly tend to cause the said Barbara Stinson to become a delinquent child:

"Contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon. (23-1034)"

nformation of District Attorney—2246-C (2)

(Annexed to Appellant's petition, Tr. 1)

* * *

"That said Robert Allen Pritchard on the 26th day of April A.D. 1952, in the said County of Klamath and State of Oregon, then and there being, did then and here wilfully, unlawfully and feloniously encourage, olicit and endeavor to persuade Darlene Smart, a female hild of the age of 12 years, to do an act which would ause the said Darlene Smart to become a delinquent hild, to-wit: Did encourage, solicit and endeavor to peruade the said Darlene Smart to participate in unnatural exual relationships with him, the said Robert Allen 'ritchard, and at the same time and place did display

and exhibit to the said Darlene Smart various lewd and immoral photographs of men and women: which said acts manifestly tend to cause the said Darlene Smart to become a delinquent child:

* * *

Information of District Attorney—2247-C (3)

(Annexed to Appellant's petition, Tr. 1)

* * *

"That said Robert Allen Pritchard on the 26th day of April A.D. 1952, in the said County of Klamath and State of Oregon, then and there being, did then and there wilfully, unlawfully and feloniously encourage, solicit and endeavor to persuade Emily Darlene Johnson, a female child of the age of 13 years, to do an act which would cause the said Emily Darlene Johnson to become a delinquent child, to-wit; Did encourage, solicit and endeavor to persuade the said Emily Darlene Johnson to participate in unnatural sexual relationships with him, the said Robert Allen Pritchard, and at the same time and place did display and exhibit to the said Emily Darlene Johnson various lewd and immoral photographs of men and women; which said acts did manifestly tend to cause the said Emily Darlene Johnson to become a delinquent child."

* * *

Oregon Laws 1949, Chapter 129, section 1, (Declared unconstitutional in *State v. Pirkey*, infra p. 23)

"Any person who, for himself or as the agent or representative of another, or as an officer, agent or employe of a corporation, and on behalf thereof, shall wilfully, with intent to defraud, make or draw, or utter or deliver any check, draft or order upon any bank or other depository, for the payment of money, knowing at the time of such making, drawing, uttering or delivering that the marker or drawer, or his principal, or the corporation,

has not sufficient funds in, or credit with said bank or other depository for the payment of such check, draft or order, in full upon its presentation, although no express representation is made that there are sufficient funds in or credit with such bank or other depository for its payment in full upon presentation, shall be guilty of a crime and *may be proceeded against either as for a misdemeanor or as for a felony, in the discretion of the grand jury or the magistrate to whom complaint is made, or before whom the action is tried, as the case may be;* and upon conviction thereof, if proceeded against as for or convicted of a misdemeanor, shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not to exceed one thousand dollars ($1,000), or by both such fine and imprisonment, or, if proceeded against as for and convicted of a felony, shall be punished by imprisonment in the penitentiary for not more than five years. If a person be proceeded against hereunder as for a misdemeanor, justice's courts, district courts and circuit courts shall have concurrent jurisdiction of such crime." (Emphasis supplied)

23-101, O.C.L.A.

"A crime or public offense is an act or omission forbidden by law, and punishable upon conviction by either of the following punishments:

"(1) Death;

"(2) Imprisonment;

"(3) Fine;

"(4) Removal from office;

"(5) Disqualification to hold and enjoy any office of honor, trust, or profit under the constitution or laws of this state."

23-102, O.C.L.A.

"Crimes are divided into:

"(1) Felonies; and

"(2) Misdemeanors."

§ 23-103, O.C.L.A.

"A felony is a crime which is punishable with death, or by imprisonment in the penitentiary of this state. When a crime punishable by imprisonment in the penitentiary is also punishable by a fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the penitentiary."

§ 23-910, O.C.L.A.

"If any person shall commit sodomy or the crime against nature, or any act or practice of sexual perversity, either with mankind or beast, or sustain osculatory relations with the private parts of any man, woman or child, or permit such relations to be sustained with his or her private parts, such person shall upon conviction thereof, be punished by imprisonment in the penitentiary not less than one year nor more than fifteen years."

ORS 34.710

"Any party to a proceeding by habeas corpus, including the state when the district attorney appears therein, may appeal from the judgment of the court refusing to allow such writ or any final judgment therein, either in term time or vacation, in like manner and with like effect as in an action. No question once finally determined upon a proceeding by habeas corpus shall be reexamined upon another proceeding of the same kind."

Daniels (Brown) v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953)

"* * * clearly the state's procedure for relief must be employed in order to avoid the use of federal habeas corpus as a matter of procedural routine to review state criminal rulings. A failure to use a state's available remedy, in the absence of some interference or incapacity, * * * bars federal habeas corpus. The statute requires

that the applicant exhaust available state remedies. To show that the time has passed for appeal is not enough to empower the Federal District Court to issue the writ. The judgment must be affirmed." (344 U.S. 487)

State v. Pirkey, 203 Or. 697, 281 P. (2d) 698 (1955)

"* * * It is one thing to fix the term of imprisonment by a grand jury before trial, and quite another to vest discretion in either a court or prison board to fix punishment in its discretion after conviction and upon consideration of the character of the defendant and the circumstances established at the trial. No standards were provided by the statute within which the grand jury or magistrate might exercise discretion, and the facts on which a quasi judicial discretion might be exercised were not available to either grand jury or magistrate.

"We hold that the provision of the statute which purports to vest in a grand jury or magistrate the unguided and untrammeled discretion to determine whether a defendant shall be cahrged with a felony or a misdemeanor, is unconstitutional. * * *" (203 Or. 707-708)

Wix v. Gladden, 204 Or. 597, 284 P. (2d) 356 (1955)

"In Article VII, Section 2 of the Constitution of Oregon, it is provided that 'the supreme court may, in its own discretion, take original jurisdiction in * * * habeas corpus proceedings.' The question presented by the petition is therefore whether this court in its own sound discretion should take jurisdiction of this case. The statute provides that the petition shall state in substance, among other things, 'That the legality of the imprisonment or restraint has not already been adjudged upon a prior writ of habeas corpus, to the knowledge or belief of the petitioner.' ORS 34.360 (6).

"The petition in the pending case not only fails to comply with the requirements of the statute quoted above, but it affirmatively sets forth that the petition filed in this court is 'an identical petition of the one which

plaintiff filed in the Circuit Court of Marion County on September 4, 1954, same being dismissed on January 26, 1955, without an opinion * * *.' Thus it affirmatively appears that the legality of the imprisonment has already been adjudged upon a prior writ of habeas corpus.

"The order dismissing the petition in the circuit court of Marion County was appealable, but no appeal has been taken. This court declines the invitation to assume jurisdiction in the pending case." (204 Or. 599)